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Supreme Court, U.S.
FILED
09-47 JUL 9 - 2009
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No. 09-

IN THE
Supreme Court of the United States

UNITED STATES AVIATION
UNDERWRITERS, INC.,
HAULERS INSURANCE COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JON A. KODANI
JEFFREY J. WILLIAMS
Counsel of Record
LAW OFFICES OF JON A. KODANI
2200 Michigan Avenue
Santa Monica, CA 90404
(310) 453-6762

QUESTION PRESENTED

Did the Eleventh Circuit err in holding – in conflict with the Ninth Circuit – that the discretionary function exception in the Federal Tort Claims Act (28 U.S.C. § 2680(a)) cloaks the government with immunity whenever the government as a whole is permitted to exercise some discretion, even though the specific government agency charged with a particular act of negligence was allowed to exercise no such discretion?

CORPORATE DISCLOSURE STATEMENT

United States Aviation Underwriters, Inc. is a wholly-owned subsidiary of General Re Corporation, a subsidiary of Berkshire Hathaway, Inc., a publicly traded corporation.

No parent or publicly held company owns 10% or more of the stock of petitioner Haulers Insurance Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United States Aviation Underwriters, Inc. and Haulers Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 562 F.3d 1297 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-6a. The petition for en banc review and panel rehearing was denied on April 16, 2009. (Pet. App. at 30a.)

The district court's order dated May 22, 2008, is published at 567 F.Supp.2d 1407, and reprinted at Pet. App. 7a-12a.

The district court's order dated December 17, 2007, is published at 530 F.Supp.2d 1315, and reprinted at Pet. App. 13a-29a.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on February 11, 2009, and denied rehearing and en banc review on April 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Tort Claims Act (FTCA) provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
> (28 U.S.C. § 2674)

The "discretionary function exception" to the FTCA provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
> (a) Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
> (28 U.S.C. § 2680(a))

STATEMENT OF THE CASE

The petitioners seek a writ of certiorari so that this Court can resolve a conflict between the United States courts of appeals regarding the scope of the discretionary function exception to the Federal Tort Claims Act (FTCA). (28 U.S.C. § 2680(a).) The published decision of the Eleventh Circuit conflicts with a decision from the Ninth Circuit in *In re Glacier Bay*, 71 F.3d 1447, as well as the reasoning of *Berkovitz v. United States*, 486 U.S. 531 (1988), and left unchecked, permits the narrow discretionary function exception to completely swallow the broad waiver of immunity in the FTCA.

Clear air turbulence (known in aviation jargon by the acronym "CAT") is invisible to airplane pilots. Severe CAT is a potentially lethal hazard to aviation.[1]

The Aviation Weather Center (AWC) is an office of the government's National Weather Service (NWS). The AWC is charged with the responsibility of always warning airplane pilots about severe CAT. AWC warnings for severe CAT are known as SIGMETs, a shorthand reference to Significant Meteorological Advisories.

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[1] CAT becomes severe when vertical wind shear exceeds 10 knots per 1,000 feet, and horizontal wind shear exceeds 40 knots per 150 miles.

NWS Instruction 10-811 is a written policy directive that says SIGMET warnings *"must be issued"* and *"will be issued"* by the AWC *"when any"* severe CAT *"is occurring, or expected to occur,"* so that airplane pilots *"can take necessary avoidance or precautionary actions."* This policy leaves no room for the exercise of any judgment about SIGMETs. *"When any"* severe CAT *"is occurring, or expected to occur,"* SIGMETs must always be issued every time, regardless of policy considerations.

On March 27, 2003, the AWC issued no relevant SIGMETs before an airplane was literally torn apart in mid-air after encountering invisible severe CAT while flying over southern Georgia at around 1:00 a.m. Falling out of the sky from an altitude of about 27,000 feet, the airplane wreckage came to rest in a swamp, killing the two people who were aboard the airplane, and destroying the airplane itself.[2]

The airplane's owner (petitioner Haulers Ins. Co.), joined by the manager for the airplane's insurance company (petitioner United States Aviation Underwriters, Inc.), sued the government

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[2] Of course, it remains possible that no SIGMET warnings were issued because there was no severe CAT occurring or expected to occur. That issue, however, is one of negligence, and negligence is irrelevant to the discretionary function inquiry. *See, e.g., Garcia v. U.S. Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008).

for negligence. Subject matter jurisdiction was based on the Federal Tort Claims Act (FTCA). (28 U.S.C. §§ 1346(a)(2) and 2674.)

In two separate orders, the district court granted the government's motions to dismiss and for summary judgment, based on the FTCA's discretionary function exception. (28 U.S.C. § 2680(a).) That exception shields from judicial review "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (Id.)

On appeal, the Eleventh Circuit affirmed the district court's orders, and later denied petitioners' requests for en banc review.

REASONS FOR GRANTING THE PETITION

The discretionary function exception to the Federal Tort Claims Act (FTCA) (28 U.S.C. § 2680(a)) "insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz v. U.S., supra*, 486 U.S. at 537.

Certiorari should be granted here to resolve a conflict between the Ninth and Eleventh Circuits on an important and recurring question of federal law: *What is the proper vantage point for the discretionary function analysis?* Does that analysis focus on the discretion exercised by the government as a whole (as the Eleventh Circuit held here), or does the analysis instead focus on the discretion exercised by the specific employee or agency charged with negligence (as the Ninth Circuit held in *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995))?

Review by writ of certiorari will permit this Court to establish a rule that requires the lower courts to focus only on the discretion exercised by the specific government agency or employee charged with negligence. That rule – followed by the Ninth Circuit, but eschewed by the Eleventh Circuit – is consistent with this Court's prior rulings, and best protects the "boundary between Congress' willingness to impose tort liability upon

the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984).

I. A CIRCUIT CONFLICT EXISTS REGARDING THE SCOPE OF THE DISCRETIONARY FUNCTION EXCEPTION.

The Eleventh Circuit fundamentally misconstrued controlling precedent. As this Court has made clear, the appropriate focus must be on the degree of choice that was in fact available, not to the agency as a whole but to the specific "acting employee" whose conduct is the basis for the tort action. *Berkovitz v. U.S., supra*, 486 U.S. at 536. The discretionary function exception shields the government from lawsuits challenging governmental action only if that specific action was based on discretion grounded in policy. *See id.* The exception was intended to protect only specific policy-based judgments, and there were no such judgments here, because the government agency was *always* required to issue SIGMET warnings.

The discretionary function exception does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because under those circum-

stances, "the employee has no rightful option but to adhere to the directive." [Cit.]" *Berkovitz v. U.S.*, *supra*, 486 U.S. at 536. Here, National Weather Service (NWS) Instruction 10-811 is that mandatory policy, because it tells the Aviation Weather Center (AWC) that SIGMET warnings "must be issued" and "will be issued" to airplane pilots "when any" severe CAT "is occurring, or expected to occur."

The Eleventh Circuit agreed that "National Weather Service Instruction 10-811 required the Aviation Weather Center [AWC] to issue a SIGMET warning once the meteorologists determine that severe CAT is occurring or is likely to occur." (Pet. App. at 5a.) Under *Berkovitz*, this finding alone should have ended the analysis in favor of the petitioners. But after recognizing that a SIGMET warning is always mandatory, the panel then ruled in favor of the government, because "the underlying determination of whether severe CAT is occurring is discretionary." (Id.) Thus, while recognizing there was no room for the AWC to exercise any judgment regarding SIGMET warnings, the Eleventh Circuit found there was room for the exercise of discretion elsewhere – in deciding whether severe CAT was occurring at all. This was a clear error of law, and created a conflict with the Ninth Circuit.

Any discretion that was used to make a judgment about whether severe CAT was occurring or expected to occur does not bring the nondiscretionary duty to warn within the exception's protection. The act of forecasting severe CAT, and the act of warning about severe CAT, must be analyzed separately.

A. The Eleventh Circuit's Published Decision Conflicts With The Ninth Circuit.

The Eleventh Circuit erred when it concluded that the government retained its sovereign immunity because discretion was needed to *forecast* severe CAT, even though no similar discretion could be used to *warn* of severe CAT. (Pet. App. at 5.) As a matter of law, any discretion that might have been used to *forecast* severe CAT could not be used make the required severe CAT *warning* discretionary.

The Eleventh Circuit's error stems from a mistaken analysis of two separate government activities: (1) forecasting, and (2) warning. This Court has made clear that, for purposes of the discretionary function analysis, each challenged government activity must be examined separately. For example, in *Berkovitz v. U.S.*, *supra*, this Court

separately analyzed three different government activities, and in *U.S. v. Gaubert*, 499 U.S. 315 (1991), this Court separately analyzed as many as seven different government activities.

As this Court observed in *Berkovitz*, "[i]n examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz v. U.S.*, *supra*, 486 U.S. at 536. Consequently, the government's decision to withhold approval of the vaccine in *Berkovitz* was not discretionary just because the government agency was first required to make a discretionary judgment about the vaccine's safety. *Id.* at 544. Contrary to *Berkovitz*, the Eleventh Circuit erred here by using the government's discretion to perform one activity (forecasting) as a basis for protecting the government from tort liability for a second activity (warning) that was not discretionary.

The Ninth Circuit followed *Berkovitz* in *In re Glacier Bay*, *supra*, where the Ninth Circuit condemned the approach used by the Eleventh Circuit here:

> As we have previously explained, the proper level of inquiry must be act by act. [Cit.] Under *Berkovitz* ..., we must determine whether *each* person

> taking an allegedly negligent action had discretion. [Cit.] The proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance. Each separate action must be examined to determine whether the specific actor had discretion of a type Congress intended to shield. ... [¶] We reject the district court's conclusion that the government cannot be liable for the final product of numerous specific actions, even if some of the actions were nondiscretionary and negligently executed, so long as others of those actions involved discretion. *In re Glacier Bay, supra*, 71 F.3d at 1451.

The warning required by NWS Instruction 10-811 is not discretionary. If severe CAT is identified, then a SIGMET warning must always be issued, every time, without exceptions. "The agency has no discretion to deviate from this mandated procedure." *Berkovitz v. U.S., supra*, 486 U.S. at 544. Likewise, if no severe CAT is identified by government forecasters, then no SIGMET warning is issued. Thus, regardless of whether severe CAT

is (or is not) forecast, NWS Instruction 10-811 always tells the government's employees what to do with regard to SIGMET warnings. In the words of *Berkovitz*, NWS Instruction 10-811 "specifically prescribes a course of action to follow," and "the employee has no rightful option but to adhere to" NWS Instruction 10-811. *Berkovitz v. U.S.*, *supra*, 486 U.S. at 536.

B. The Eleventh Circuit's Published Decision Permits The Narrow Discretionary Function Exception To Swallow The General Waiver Of Tort Immunity Established By Congress In The Federal Tort Claims Act.

Certiorari should be granted, because the Eleventh Circuit's published decision is not only inconsistent with *Berkovitz* and *In re Glacier Bay*, but it also expands the reach of the discretionary function exception so far as to swallow the waiver of tort immunity in the FTCA itself.

Using the Eleventh Circuit's questionable analysis, every mandatory government activity becomes discretionary if the government points to the exercise of some discretion by some government employee somewhere in a chain of activities that leads up to a particular event. "No doubt many actions within an agency pass through the hands of

somebody with some discretion at some stage." *General Dynamics Corporation v. United States*, 139 F.3d 1280, 1284 (9th Cir. 1998).

While the government as a whole may have exercised some judgment in deciding whether severe CAT was occurring or expected to occur,[3] that judgment was distinct from the government's mandatory duty to warn. No judgment was permitted or required with regard to that duty to warn. The required SIGMET warnings were always required every time the AWC became aware of severe CAT, and thus, the duty to warn was not triggered by a discretionary judgment, but by knowledge that severe CAT was occurring or expected to occur.

Without certiorari review, the Eleventh Circuit's published decision crosses the "boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *U.S. v. Varig Airlines, supra*, 467 U.S. at 808. To promote the intent of Congress, certiorari should be granted to resolve a conflict between the Ninth and Eleventh Circuits, and to establish a rule of law that "discretion to perform one act cannot bring

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3 It is doubtful that the discretion used to forecast weather conditions is the kind of public policy judgment that is protected by the discretionary function exception.

other nondiscretionary acts within the exception's protection." *In re Glacier Bay, supra*, 71 F.3d at 1455.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JON A. KODANI
JEFFREY J. WILLIAMS*
LAW OFFICES OF JON A. KODANI
2200 Michigan Avenue
Santa Monica, CA 90404
(310) 453-6762

**Counsel of Record*

APPENDIX

Appendix A

562 F.3d 1297

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES AVIATION UNDERWRITERS, INC., a New York corporation, Manager, United States Aircraft Insurance Group, Haulers Insurance Company, Inc., a Tennessee corporation, Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.
No. 08-13544
Non-Argument Calendar.

Feb. 11, 2009.

Appeal from the United States District Court for the Middle District of Georgia.

Before MARCUS, WILSON and ANDERSON, Circuit Judges.

PER CURIAM:

This case arises from the crash of a twin-engine aircraft in southern Georgia on March 27, 2003. United States Aviation Underwriters, Inc. and Haulers Insurance Company, Inc. (collectively, "Insurers") sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), for damages to the aircraft. The Insurers appeal the district court's May 22, 2008 Order

granting summary judgment on behalf of the United States on the grounds that the Insurers' claims fall within the discretionary function exception to the FTCA's waiver of sovereign immunity.

The Insurers contend that the Aviation Weather Center, which is a meteorological watch office of the National Weather Service, has a non-discretionary duty to issue Significant Meteorological Information ("SIGMET") warnings whenever sudden ***1299** severe clear air turbulence ("CAT") "is occurring, or expected to occur." The Insurers rely on National Weather Service Instruction 10-811 from the National Weather Service instruction manual for meteorologists to support this claim.

The United States concedes that, once the National Weather Service forecasts moderate to severe turbulence, the United States government has no discretion to decline to provide that information to pilots. However, the United States contends that the act of forecasting CAT is discretionary conduct that falls outside of the discretionary function exception.

By contending that the Insurers' claims are governed by the discretionary exception to the FTCA, the United States factually attacks our subject matter jurisdiction. We review *de novo* factual attacks on the existence of subject matter jurisdiction. See *Ochran v. United States*, 117 F.3d

495, 499 (11th Cir.1997). We review "the facts in the light most favorable to the plaintiff." *Cranford v. United States*, 466 F.3d 955, 957 (11th Cir.2006) (quotation omitted), cert. denied, --- U.S. ----, 128 S.Ct. 42, 169 L.Ed.2d 11 (2007).

The discretionary function exception excludes from the FTCA's broad waiver of sovereign immunity "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). When the discretionary function exception to the FTCA applies, no federal subject matter jurisdiction exists. *United States v. Gaubert,* 499 U.S. 315, 334, 111 S.Ct. 1267, 1280, 113 L.Ed.2d 335 (1991) (holding that claims are barred by the discretionary function exception).

Although a precise definition of "discretionary" does not exist, the Supreme Court has characterized the ultimate question as whether the "challenged acts ... are of the nature and quality that Congress intended to shield from tort liability." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797, 813, 104 S.Ct. 2755, 2764, 81 L.Ed.2d 660 (1984). The discretionary function exception is intended to prevent the courts from " 'second-guessing' ... administrative decisions grounded in social, economic, or political policy through the med-

ium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.

In *Gaubert,* the Supreme Court set out a two-part test to guide courts in determining whether the discretionary function applies. *See Gaubert,* 499 U.S. at 322, 111 S.Ct. at 1273. First, the court must examine whether the challenged conduct is "discretionary in nature" or whether the conduct "involve[s] an element of judgment or choice." *Id.* (quoting *Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988)) (internal quotation marks omitted). Second, the court must decide "whether that judgment is of the kind that the discretionary function exception was designed to shield," i.e., whether it is "susceptible to policy analysis." *Id.* at 322, 325, 111 S.Ct. at 1273, 1275. A function is non-discretionary "if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" where "the employee has no rightful option but to adhere to the directive." *Id.* at 322, 111 S.Ct. at 1273 (internal quotation marks omitted). "If the decision is inherently one allowing discretion, we presume that the act was grounded in policy whenever that discretion is employed." *OSI, Inc. v. United States,* 285 F.3d 947, 951 (11th Cir.2002).

*1300 Here, as the United States contends and the district court found, forecasting CAT is discretionary conduct that the discretionary func-

tion exception shields from liability. As the United States concedes, National Weather Service Instruction 10-811 requires that the Aviation Weather Center issue a SIGMET warning once the meteorologists determine that severe CAT is occurring or is likely to occur. However, the underlying determination of whether severe CAT is occurring is discretionary.

The evidence demonstrates that forecasting weather, and specifically distinguishing between moderate and severe air turbulence, requires subjective evaluation by the meteorologist. The meteorologist must weigh a number of factors and a range of available data. Because the meteorologist must exercise his judgment when identifying weather patterns, forecasting "involve[s] an element of judgment or choice." *Gaubert,* 499 U.S. at 322, 111 S.Ct. at 1273. That element of judgment satisfies the first part of the discretionary function test.

Moreover, we agree with the district court that weather forecasts are the type of policy decisions that the discretionary function exception protects from liability under the FTCA. As we recognized in *Monzon,* issuing weather warnings implicates policy concerns. *Monzon v. United States,* 253 F.3d 567, 572 (11th Cir.2001) (per curiam). These policy concerns include the cost and budgetary policy considerations in forecasting and the dangers of

over warning. *Id.* "A weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources." *Brown v. United States,* 790 F.2d 199, 204 (1st Cir.1986). As such, weather forecasting satisfies the second part of the discretionary function exception as well.

CONCLUSION

Upon review of the record and the parties' briefs, we discern no reversible error. Accordingly, we affirm the district court's grant of summary judgment on behalf of the United States.

AFFIRMED.

Appendix B

567 F.Supp.2d 1407

United States District Court,
M.D. Georgia,
Valdosta Division.
UNITED STATES AVIATION UNDERWRITERS INC.; and Haulers Insurance Co., Inc., Plaintiffs,
v.
UNITED STATES of America, Defendant.
No. 7:05-cv-119 (HL).

May 22, 2008.

ORDER

LAWSON, District Judge.

Before the Court is Defendant's Motion for Summary Judgment (Doc. 22) and Plaintiffs' Motion for Hearing (Doc. 24). The issues before the Court have been adequately briefed and a hearing would not aid the Court in their resolution. The Motion for Hearing is therefore denied. For the reasons set out below, Defendant's Motion for Summary Judgment is granted.

I. BACKGROUND

This case arises out of a 2003 airplane crash. Plaintiffs Complaint sought damages from the United States for failures to predict and communicate weather turbulence, which allegedly

caused the crash. In an Order dated December 17, 2007, the Court found that under the Federal Tort Claims Act (FTCA) it lacked jurisdiction to entertain all but one of Plaintiffs' claims. As the Court explained in that Order, forecasting turbulence is a discretionary function, and the FTCA exempts the Government from liability for discretionary acts. The Court held, however, that if the Government had in fact forecasted turbulence and issued warnings, then there was no discretion to fail to provide that information to the crew. The Government would therefore be liable if it had issued weather advisories but negligently failed to inform the pilot of them.

Defendant now seeks summary judgment on this issue, claiming it is undisputed that no weather advisory had issued, and therefore it could not have negligently failed to warn the plane of air turbulence. Plaintiffs concede that no warning had been issued, but argue that the National Weather Service knew or should have known severe turbulence was occurring and thus had no discretion to fail to issue the warning.

II. FACTS

The Aviation Weather Center (AWC) is a Meteorological Watch Office in Kansas City, Missouri. It is responsible for issuing Airman's Meteorological Advisories (AIRMETs) which "contain details of potentially hazardous conditions

over the United States and adjacent waters." Pl.'s Resp. Mot. Summ. J. Ex. 1 at 3. When one of several weather hazards "occurs, or is expected to occur, and affect an area of least 3,000 square miles," an AIRMET bulletin is produced. *Id.* Likewise, Significant Meteorological Advisories (SIGMETs) are issued "[w]hen weather conditions meeting or exceeding criteria for SIGMET issuance occur or are expected to occur within two (2) hours." *Id.* at 4. One of the weather hazards that can warrant the issuance of SIGMETs or AIRMETs is clear air turbulence (CAT).

Weather forecasting involves "a decision-making process where [a] forecaster uses discretion to make a judgment as to the quality of the information ... a subjective, discretionary decision after they go through the entire process, from looking at the raw information, displaying that information, getting a large-scale picture, and ***1409** then trying to tailor it down to a smaller scale event." Def.'s Mot. Dismiss Ex. 6 at 3. Even the distinction between SIGMETs and AIRMETs involve "a subjective evaluation of the meteorologist" based on a number of factors and available data. Def.'s Mot. Dismiss Ex. 5.

III. ANALYSIS

A. Standard

Under the FTCA, the federal government waives its

sovereign immunity for certain kinds of tort claims brought against it. *See* 28 U.S.C.A. § 2671 et seq. (West 2006). This waiver does not, however, apply to those claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a). Therefore, the Government encounters no liability for a discretionary act-regardless of the degree to which that discretion is abused. The aim of this "discretionary function" exception is to prevent courts from "second-guessing" decisions that are grounded in social, economic, or political policy. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984)(*Varig Airlines*). The test for whether a claim falls under the discretionary function is a two-pronged analysis: first, the court determines whether the conduct at issue involves "an element of 'judgment or choice.' " *Monzon v. United States*, 253 F.3d 567, 570 (quoting *Berkovitz et al. v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). If so, the court then analyzes whether the "that judgment is of the kind that the discretionary function exception was designed to shield"-in other words, decisions that are based on considerations of social, economic, or political policy. *Berkovitz*, 486 U.S. at 536-37, 108 S.Ct. 1954.

B. Application

As stated above, Plaintiff concedes that NWS did not issue an AIRMET or SIGMET, therefore any claim based on air traffic control's failure to issue a warning to the pilot is dismissed. Nonetheless, Plaintiffs attempt to resurrect the question whether the Government is liable under the FTCA for the failure to forecast or recognize the SIGMET or AIRMET, despite the Court's previous Order, which stated that weather forecasting and the issuance of a SIGMET or AIRMET is "conduct that the discretionary exception function protects and as such these actions are not subject to liability under the FTCA." *See* Order, Dec. 17, 2007 at 14. Plaintiffs argue that because there was CAT actually occurring that warranted a SIGMET or AIRMET, the AWC had no discretion to fail to issue the warning. Plaintiff's rely on language from NWS Instruction 10-811 which states that a AIRMET or SIGMET "will be issued when" moderate to severe CAT "is occurring." Pls.'s Resp. Mot. Summ. J. Stmt. Mat. Facts ¶ 4.

Plaintiffs' argument fails, however, for reasons already detailed in the Court's December 17, 2007 Order. In short, determining whether moderate to severe CAT "is occurring" requires discretion, and deciding whether a disturbance is properly characterized as moderate or severe-and hence whether to issue an AIRMET or SIGMET-also requires discretion. As the Court explained in its

previous Order, these kinds of decisions are the type of decision that the FTCA was designed to shield because they are grounded in social, economic, and political policy. Although the NWS instruction ***1410** that Plaintiffs cite speaks in mandatory terms, it mandates a response (i.e., the issuance of an AIRMET or SIGMET warning) after a discretionary decision is made (i.e., whether CAT is occurring that meets the criteria for a warning). Because the Government never decided that significant CAT was occurring, the NWS Instruction never required a response.

IV. CONCLUSION

Plaintiffs essentially argue that the CAT was so severe and so obvious that the Government had to know it was occurring, therefore there was no discretion to fail to issue the warnings. However, where an action is discretionary-as in the case of weather diagnostics and forecasting-not even the Government's gross negligence is actionable. *See, e.g., Relf v. United States,* 433 F.Supp. 423, 428 (D.D.C.1977), *aff'd,* 593 F.2d 1371 (D.C.Cir.1979).

Defendant's Motion for Summary Judgment is therefore granted and Plaintiffs' remaining claims are dismissed.

530 F.Supp.2d 1315

United States District Court,
M.D. Georgia,
Valdosta Division.
UNITED STATES AVIATION UNDERWRITERS INC.; and Haulers Insurance Co., Inc., Plaintiffs,
v.
UNITED STATES of America, Defendant.
No. 7:05-cv-119 (HL).

Dec. 17, 2007.

ORDER

HUGH LAWSON, District Judge.

I. BACKGROUND

On March 27, 2003, shortly after midnight, a small, twin-engine airplane crashed in South Georgia. Both the pilot and co-pilot were killed. Plaintiffs United States Aviation Underwriters, Inc. ("USAU") and Haulers Insurance Company, Inc. ("Haulers") have brought the present lawsuit, pursuant to the Federal Tort Claims Act ("FTCA") to recover the damages, losses, and expenses they incurred as a result of the crash.[FN1] Specifically, USAU and Haulers contend that sudden clear air turbulence ("CAT") caused the accident. Their pleadings and arguments suggest that they allege negligence by the United States under two alterna-

tive theories: the Government either failed to exercise reasonable care in forecasting the CAT or it knowingly failed to warn the crew of the CAT that it knew was occurring or was going to occur.[FN2]

> FN1. Haulers, the owner of the aircraft involved in the crash, is the real party in interest but has assigned its rights and causes of action to USAU.
>
> FN2. Plaintiffs state that:
>
> > [t]he conduct at issue in this case can be summarized as follows:
> >
> > (1) moderate to severe CAT was actually occurring over an area of at least 3,000 square miles at the time of the crash; (2) the FAA and the NWS negligently failed to issue an AIRMET or SIGMET (warning) for that CAT; (3) the crash was caused by an encounter with severe unforecasted CAT; and (4) if an AIRMET or SIGMET had been issued, the crash would not have occurred.
> >
> > Pls.'s Resp. at 16. The second and third points simply allege causation, not negligent conduct.

*1317 The National Weather Service Instruction Manual addresses the procedures for developing Area Forecasts ("FAs") and Significant Meteorologi-

cal Information ("SIGMET"), and Airman's Meteorological Information ("AIRMET"). Def.'s Mot. Dismiss Ex. ("Def.'s Ex.") 2 at 3. SIGMETs and AIRMETs provide warnings of various dangerous conditions for aircraft, including CAT. The NWS has four meteorological watch offices: The Aviation Weather Center (AWC) is one of those offices and has responsibility for issuing the area forecasts for the forty-eight coterminous states. *Id.* Area forecasts "describe in abbreviated language specified en-route weather phenomena" and include references to any valid SIGMETs or AIRMETs. *Id.* at 4-5. The NW S's weather services provide complete coverage to aviation customers in United States-controlled airspace. *Id.* at 3.

II. ANALYSIS

A. Structure of the FTCA

The FTCA provides that the United States may be held liable for the negligent conduct of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.A. § 2674 (West 2006). Congress did not intend to create new causes of action when it implemented the FTCA, but only to "provide redress for ordinary torts recognized by state law." *Howell v. United States,* 932 F.2d 915, 917 (11th Cir.1991). If a private party in a comparable position would not be held liable under

the applicable state law, then the federal government would not be liable under the FTCA. *Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir.2004). This requirement of a state law analogue is a jurisdictional prerequisite; if there is no state law under which a private person would be liable, then federal courts do not have subject matter jurisdiction to entertain the suit against the Government.

Despite the consent to suit embodied in the FTCA, Congress retained the principle of sovereign immunity in certain situations, incorporating numerous exceptions into the Act. *See* 28 U.S.C.A. § 2680(a)-(n). If either the state analogue is missing or one of the exceptions applies, dismissal is appropriate. *Monzon v. United States,* 253 F.3d 567, 570 n. 2 (11th Cir.2001) (affirming dismissal of FTCA claim based on application of the discretionary function exception without addressing question of liability under state law).

B. Facial Attack: State Law Analogue

1. Standard in a Facial Challenge under Rule 12(b)(1)

The Government has made both factual and facial challenges to this Court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In a facial attack, the movant alleges a lack of subject matter jurisdiction based on the face

of the pleadings. The assertions in the complaint are therefore taken as true, and the court does not consider evidence outside of the pleadings. *McMaster v. United States,* 177 F.3d 936, 940 (11th Cir.1999). The plaintiff carries the burden of alleging facts sufficient to demonstrate subject matter jurisdiction. In its facial ***1318** challenge, the Government argues that there is no state law under which Plaintiff could recover in an analogous suit against a private individual. As noted above, without a state law analogue this Court has no jurisdiction to entertain the suit against the United States. The use of a Motion to Dismiss to address this issue is therefore appropriate.

2. Choice of Law

In claims involving the FTCA, federal courts must apply the conflict-of-laws rules of the state where the negligent act or omission occurred. *Richards v. United States,* 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Plaintiffs' Complaint states that the "act or omissions giving rise to the claim occurred [in the Middle District of Georgia] near Homerville, Georgia." Compl. ¶ 2.0. Georgia courts use the rule of *lex loci delicti,* which provides that the substantive law of the state where the tort was committed governs. *Dowis v. Mud Slingers, Inc.,* 279 Ga. 808, 621 S.E.2d 413. 419 (2005). According to the pleadings, the act or omission occurred in Georgia, so Georgia substantive law would govern.[FN3]

FN3. Both Parties argue in their briefs that Florida or Tennessee law governs. The Complaint, however, provides no indication of what acts or omissions may have occurred in either of these states. The only reference in the Complaint to either Florida or Tennessee alleges that "the Airplane was flying from Tennessee en route to Florida via Georgia, and in contact with (and being monitored by) the defendant USA's Air Traffic Controllers and/or radar control specialists." Compl. ¶ 7.0. The Court assumes, as it must, that the allegations in the Complaint are true and that the tortious act or omission occurred in Georgia.

3. Liability of a Private Person In "Like Circumstances" Under Georgia Law

The FTCA makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.A. § 2674. It is not necessary that the state's law support an action against a private individual in the *exact* circumstances as the federal government; if a private party in an analogous situation would owe a duty to the defendant then the FTCA's "like circumstances" requirement is met. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64-65, 76 S.Ct. 122, 100 L.Ed. 48 (finding that good Samaritan principle provides a basis for liability for negligent lighthouse operation); *United States v.*

Olson, 546 U.S. 43, 47, 126 S.Ct. 510, 163 L.Ed.2d 306 (2005) (holding that federal mine inspectors are liable to the same extent as private safety inspectors).

In *Indian Towing Co. v. United States,* the United States Supreme Court held that the federal government was liable under the FTCA for negligently operating a lighthouse. *Indian Towing,* 350 U.S. at 64-65, 76 S.Ct. 122. It recognized that the operation of a lighthouse was a uniquely government function that a private individual would not perform. *Id.* at 64, 76 S.Ct. 122. Nonetheless, the Court seized upon the FTCA's language of "like circumstances," emphasizing that the statute did not require that a private person would be liable under the same circumstances. *Id.* Instead of asking whether private operators of lighthouses would be liable to seamen, the Court made a much more generalized inquiry. It found that the good Samaritan principle provided the necessary basis for liability under state law: "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65, 76 S.Ct. 122.

*1319 In the present case, Haulers, as the owner of the aircraft, argues that the Government had a duty to the airplane's crew to exercise reasonable care in forecasting turbulence and providing warnings of forecasted turbulence. The duty to the

crew then creates liability to the third-party owner of the airplane. Georgia has adopted a version of the good Samaritan doctrine as articulated in the Restatement of Torts. *Huggins v. Aetna Cas. & Sur. Co.,* 245 Ga. 248, 264 S.E.2d 191, 192 (1980) (adopting Restatement of Torts (Second) § 324A). Under the Restatement,

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement of Torts (Second) § 324A. Unlike the basic principle the Supreme Court recited in *Indian Towing,* under Georgia law a voluntary undertaking only creates liability when one of the three additional requirements is present. *See* Restatement of Torts (Second) § 324A(a)-(b); *Boyce v. Gregory Poole Equip. Co.*, 269 Ga.App. 891, 605

S.E.2d 384 (2004) (finding that seller of forklift undertook safety investigation and discussed safety options with buyer, which could create a duty of reasonable care if there was detrimental reliance); *Adler's Package Shop, Inc. v. Parker,* 190 Ga.App. 68, 378 S.E.2d 323 (1989) (refusing to find store liable when it undertook to provide security but injured patron did not rely on the store to do so).

[1] There is no allegation that the United States was performing a duty owed to the pilot by some third party. Similarly, Plaintiffs do not argue that United States increased the risk of the weather conditions when it chose to attempt to provide forecasts. *See Dale v. Keith Built Homes, Inc.,* 275 Ga.App. 218, 620 S.E.2d 455 (2005) (defendant's negligent act must have made the condition worse than it would have been had he not acted at all). Consequently, subsections (a) and (b) do not apply in this case. Instead, Plaintiffs allege that the pilot detrimentally relied on the United States' voluntary undertaking of forecasting turbulence and communicating warnings to pilots. *See* Restatement (Second) of Torts § 324A(c).

Defendant makes three responses to Plaintiffs' claim that the good Samaritan doctrine provides a basis for liability of a private person in like circumstances under state law. First, there is no need to look "further afield" to the good Samaritan doctrine for an analogue to Government forecasters because private forecasters exist and have not been

found liable under state law. Georgia courts have not ruled one way or another, however, on the issue of forecaster's liability under Georgia law, so there is indeed a need to look for a broader analogy. Second, they argue that the good Samaritan doctrine "requires the voluntary assumption of a duty to a specific individual or group of individuals, not to the public at large." Def.'s Reply at 4. Regardless of whether this is true, the duty in this case would be to the pilots and passengers, not to the public at large. This is a group of individuals is just as discrete as the group of individuals that ***1320** were owed a duty in *Indian Towing*, i.e., ship captains and passengers.

Finally, Defendant responds that imposing liability on the United States or any private forecaster for negligent forecasting of turbulence would create disastrous results and wide ranging, uncontrollable liability. In making this argument, however, the Government ignores the significant limitations that Georgia's good Samaritan doctrine places on the creation of liability. First, it only applies if the one who undertakes renders services that he should recognize as necessary for the protection of the individual or his things. Although predicting and recognizing turbulence is clearly necessary for the protection of individuals, predicting many other kinds of weather phenomena is not. Second, he is only liable for physical harm, not economic, emotional, or other kinds of harm. Third, he is liable only for negligent performance of services.

This is an especially important point considering the government's argument that recognizing a duty would result in liability for any failure to accurately predict the weather; on the contrary, the Government would only be responsible for a turbulence forecast that was negligent, not simply inaccurate. Finally, as noted above, one of the three additional factors must apply.

As the Government undertook to operate a lighthouse in *Indian Towing*, the Government in this case undertook to forecast CAT and to provide pilots with warnings it had issued. It likewise should have realized that both accurately predicting CAT and providing warnings of predicted CAT to pilots was necessary for the protection of the crew and Haulers' aircraft. Plaintiffs have also pled facts that indicate the deceased may have relied on the Government's provision of services and warnings. *See* Restatement of Torts (Second) § 324A(c). In these circumstances, the United States would have a duty to exercise reasonable care in performing weather forecasting services and providing warnings to pilots under Georgia law.

C. Factual Attack: Discretionary Function

1. Standard in a Factual Challenge Under Rule 12(b)(1)

"Factual attacks challenge the existence of subject matter jurisdiction in fact, irrespective of the

pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *McMaster v. United States,* 177 F.3d 936, 940 (11th Cir.1999) (citation and quotations omitted). When evaluating a factual attack, a court is not bound to accept plaintiff's allegations as truthful, "and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* (citation and quotations omitted). Defendant attacks this Court's subject matter jurisdiction based on the discretionary exception function to the FTCA. This is a factual attack on jurisdiction because the application of the discretionary function exception depends on the facts of the case and cannot be resolved by looking to the pleadings alone.

2. Standard for Discretionary Functions

The Government's waiver of liability under the FTCA does not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a) (West 2006). The Supreme Court of the United States has recognized that a precise definition of "discretionary" does not exist. ***1321** *United States v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797, 813, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (*Varig Airlines*). The Court, however, characterized the ultimate

question as whether the "challenged acts ... are of the nature and quality that Congress intended to shield from tort liability." *Id.* at 813, 104 S.Ct. 2755. By including the discretionary function exception, Congress aimed to prevent courts from "second-guessing" decisions that are grounded in social, economic, or political policy. *Id.* at 814, 104 S.Ct. 2755.

The discretionary function analysis is two-fold. Under the first prong of the analysis, the court determines whether the conduct at issue involves "an element of 'judgment or choice.' " *Monzon,* 253 F.3d at 570 (quoting *Berkovitz et al. v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). When a statute, regulation, or other policy specifically directs an employee to take a certain action, the discretionary function exception does not apply "because under those circumstances, 'the employee has no rightful option but to adhere to the directive.' " *Id.* (quoting *Berkovitz,* 486 U.S. at 536, 108 S.Ct. 1954). Under the second prong, even if the conduct involves an element of judgment, the discretionary function exception will only apply if "that judgment is of the kind that the discretionary function exception was designed to shield"-in other words, decisions that are based on considerations of social, economic, and political policy. *Berkovitz,* 486 U.S. at 536-37, 108 S.Ct. 1954.

3. Application

Defendant concedes that once NWS forecasts moderate to severe turbulence, there is no discretion to decline to provide that information to the pilot. Both parties therefore agree that the discretionary function exception does not apply to one of Plaintiffs' two alternative theories of the case, i.e., that the Government had issued an AIRMET or SIGMET but failed to provide that information to the flight crew. The Government does contend, however, that forecasting CAT is discretionary conduct that the exception shields from liability. The Government therefore argues that even if the NWS was negligent in failing to forecast CAT, that omission is not actionable under the FTCA.

Plaintiffs point to two policy directives that govern the conduct of employees and prevent the exercise of discretion: NWS Instruction 10-810 and 10-811. Specifically, NWS Instruction 10-810 states, in part, that "[w]hen weather conditions meeting or exceeding criteria for SIGMET issuance occur or are expected to occur within two (2) hours, a SIGMET will be issued." Pls.'s Response Def.'s Mot. Dismiss Ex. ("Pls.'s Ex.") 1 at 3. In addition, under the heading "SIGMET Criteria" NWS Instruction 10-811 states that "SIGMETs will be issued when [severe turbulence] is occurring, or expected to occur, affecting an area approximately one (1) latitude degree squared, (about 3000 square miles),

or an area deemed to have a significant effect on the safety of aircraft operations." Pls.'s Ex. 2 at 9. The Instruction requires that "[a]n AIRMET will be issued when [moderate turbulence] occur[s] and affect[s] an area of at least 3,000 square miles". Pls.'s Ex. 2 at 13.

As the Government has conceded, these regulations leave no room for discretion once it is clear that a SIGMET or AIRMET has been or is expected to occur; the AW S is required to issue the warning under the clear language of the NWS Instruction Manual. Plaintiffs do not, however, isolate any rule or regulation that governs the development of weather forecasts or the determination of whether a meteorological event is taking place at any *1322 given moment. In fact, one witness testified that making a weather forecast entails collecting information from a variety of sources and incorporating all the information "into a decision-making process where our forecaster uses discretion to make a judgment as to the quality of the information ... a subjective, discretionary decision after they go through the entire process, from looking at the raw information, displaying that information, getting a large-scale picture, and then trying to tailor it down to a smaller scale event." Def.'s Ex. 6 at 3. In addition, SIGMETs include severe turbulence, while moderate turbulence is characterized as an AIRMET. *Compare* Pls.'s Ex. 1 at 2 *with* Pls.'s Ex. 2 at 9. Distinguishing between the moderate and severe air turbulence is "a subjec-

tive evaluation of the meteorologist" based on a number of factors and available data. Defs.'s Ex. 5. A forecaster must therefore exercise his or her judgment when identifying the weather pattern.

Under the second prong of the analysis the action is only protected, however, if the decision was grounded in social, economic, or political policy. Courts have overwhelmingly held that weather forecasts are the kinds of decisions that the discretionary function was meant to protect from liability under the FTCA. As the Eleventh Circuit Court of Appeals has recognized, issuing weather warnings implicate policy concerns, including the dangers of "over warning," the economic impact of "oversized" forecasts, and the staffing limitations upon the NW S in light of the demands for forecasting. *Monzon,* 253 F.3d at 572 (noting cost concerns in making forecasts and issuing warnings); *see also Spencer v. New Orleans Levee Bd.,* 737 F.2d 435, 437 (5th Cir.1984); *Bergquist v. Nat'l Weather Svc.,* 849 F.Supp. 1221, 1233 (N.D.Ill.1994) (recognizing three policy factors implicated in forecasting as cost, dangers of over warning, and desirability of vesting discretion in forecasters).

Making the weather forecast and determining whether a SIGMET or AIRMET was happening or was going to happen is therefore conduct that the discretionary exception function protects and as such these actions are not subject to liability under

the FTCA. If meteorologist determined that a SIGMET or AIRMET warning was warranted, however, there was no discretion to decline to issue that warning under NWS policy.

III. CONCLUSION

The Court grants Defendant's Motion to Dismiss with regard to claims for negligent forecasting. *See* Compl. ¶ 16.2-16.3 It denies the Motion, however, with regard to any claims Plaintiffs have against the Government for failure to warn the flight crew of turbulence advisories that meteorologists had issued. *See* Compl. ¶ 16.1, 16.4-16.5. Defendant has attacked the merits of this remaining claim, *see* Def.'s Reply at 6, but such at attack is appropriately addressed at the summary judgment stage, not on a Motion to Dismiss. The Court recognizes that the time for filing of dispositive motions has expired. *See* March 27, 2006 Order (Doc. 11). The Court therefore grants the parties leave to file dispositive motions on or before January 17, 2008.

SO ORDERED.

Appendix D

Unpublished

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES AVIATION UNDERWRITERS, INC., a New York corporation, Manager, United States Aircraft Insurance Group, Haulers Insurance Company, Inc., a Tennessee corporation, Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.
No. 08-13544

April 16, 2009.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC.

BEFORE: MARCUS, WILSON and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/
UNITED STATES CIRCUIT JUDGE

No. 09-17

In the Supreme Court of the United States

UNITED STATES AVIATION UNDERWRITERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' tort action against the United States, which alleged negligent failure to warn pilots of unforecast turbulence.

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In the Supreme Court of the United States

No. 09-47

UNITED STATES AVIATION UNDERWRITERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 562 F.3d 1297. The opinions of the district court (Pet. App. 7a-12a, 13a-29a) are reported at 567 F. Supp. 2d 1407 and 530 F. Supp. 2d 1315, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2009. A petition for rehearing was denied on April 16, 2009 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on July 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, provides a limited waiver of sovereign immunity for certain tort actions against the United States. The FTCA's waiver of immunity is subject to several express exceptions, see 28 U.S.C. 2680(a)-(n), including, as pertinent here, the "discretionary function" exception. 28 U.S.C. 2680(a). That exception provides that the FTCA shall not apply to:

> Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Ibid.

An action comes within the discretionary function exception if (1) it "involves an element of judgment or choice," and (2) the "judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial second-guessing" of decisions "grounded in social, economic, and political policy" (internal quotation marks omitted)).

2. On March 27, 2003, a small twin-engine aircraft crashed, killing the two pilots on board. Pet. App. 13a.

Petitioners, the owner of the plane and its insurer, contend that the crash was precipitated by the plane's encountering of unforecast "clear air turbulence" (CAT) of severe intensity. *Id.* at 13a-14a & nn.1 & 2; Pet. 4-5.

Petitioners filed suit against the United States to recover damages for losses they suffered as a result of the crash under the FTCA. Pet. App. 13a. Petitioners attribute the accident to the failure of the National Weather Service (NWS) to forecast severe CAT allegedly occurring during the flight, and to the failure of the Aviation Weather Center (AWC) to issue an advisory to pilots about that turbulence. Petitioners relied upon an NWS policy directive (NWS Instruction 10-811) stating that an advisory to pilots, known as a Significant Meteorological Advisory (SIGMET), "will be issued" when severe CAT and other weather hazards meeting specified criteria "occur or are expected to occur." *Id.* at 5a, 9a, 26a.

The United States moved to dismiss, arguing that petitioners' claim was barred by the discretionary function exception to the FTCA. The district court granted the motion with respect to petitioners' claim that the NWS negligently failed to forecast severe turbulence. The court explained that "[m]aking the weather forecast and determining whether a SIGMET * * * was happening or was going to happen is * * * conduct that the discretionary [function exception] protects." Pet. App. 28a. The district court denied the motion to dismiss as to petitioners' claim that the AWC breached its nondiscretionary duty to provide a warning to pilots once a "meteorologist determined that a SIGMET * * * warning was warranted." *Id.* at 29a.

The district court later granted summary judgment to the government on petitioners' remaining claim re-

garding the failure of the AWC to provide a warning to the pilots, based upon petitioners' concession that, in fact, the NWS had not forecast severe turbulence. Pet. App. 8a. The court reasoned that because the NWS never determined that severe turbulence was occurring or expected to occur, the nondiscretionary duty to issue a SIGMET and provide information to the pilot about the occurrence of such turbulence never arose. *Id.* at 12a.

3. The court of appeals affirmed. Pet. App. 1a-6a. The court explained that "[b]ecause the meteorologist must exercise his judgment when identifying weather patterns, forecasting 'involve[s] an element of judgment or choice,'" and thereby satisfies the first prong of the discretionary function analysis. *Id.* at 5a (alteration in original) (quoting *Gaubert*, 499 U.S. at 322). The court also agreed that "weather forecasts are the type of policy decisions that the discretionary function exception protects from liability under the FTCA." *Ibid.* Such forecasts and accompanying warnings, the court explained, implicate "cost and budgetary policy considerations * * * and the dangers of over warning." *Id.* at 5a-6a. The court noted that, if NWS meteorologists had determined that severe turbulence was occurring or was likely to occur, issuance of a SIGMET warning by the AWC would have been required under the pertinent NWS instruction. *Id.* at 5a. But the court concluded that the "underlying determination of whether severe CAT is occurring is discretionary." *Ibid.* Thus, because NWS meteorologists did not make such a determination, the AWC's nondiscretionary duty to issue a SIGMET warning never arose.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The court of appeals correctly held, in accordance with well-established precedent, that the discretionary function exception bars petitioners' claims in their entirety. See *Monzon* v. *United States*, 253 F.3d 567, 572 (11th Cir. 2001) (failure of the NWS to issue a warning regarding riptides was protected by the discretionary function exception), cert. denied, 535 U.S. 1035 (2002); *Brown* v. *United States*, 790 F.2d 199, 203 (1st Cir. 1986) (weather forecasting "[w]ithout question" constitutes a discretionary function), cert. denied, 479 U.S. 1058 (1987); *National Mfg. Co.* v. *United States*, 210 F.2d 263, 278 (8th Cir.) ("The forecasting or omission of forecasts * * * is a 'discretionary function' excepted from the [FTCA] by Section 2680(a)."), cert. denied, 347 U.S. 967 (1954). As these decisions have recognized, claims premised upon the forecasting of weather implicate both parts of the discretionary function inquiry: they involve the exercise of discretion, and they are "susceptible to policy analysis," *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991).

a. Weather forecasting is fundamentally discretionary in character and "involve[s] an element of judgment or choice." Pet. App. 5a (alteration in original) (quoting *Gaubert*, 499 U.S. at 322). As the court of appeals explained, the record below demonstrates that forecasting and identifying weather patterns "requires subjective evaluation by the meteorologist," and "[t]he meteorologist must weigh a number of factors and a range of available data." *Ibid.*; see *id.* at 27a-28a (district court noting

that petitioners did not "isolate any rule or regulation that governs the development of weather forecasts or the determination of whether a meteorological event is taking place at any given moment," and concluding that "[a] forecaster must * * * exercise his or her judgment when identifying the weather pattern"); *Brown*, 790 F.2d at 204-205 (Pettine, J., concurring) (weather forecasting consists of a prediction determined by numerous and varied factors, none of which is necessarily determinative).

Petitioners argue that the discretionary function exception is inapplicable because the NWS's discretion regarding the forecasting and identification of weather patterns does not extend to the AWC's nondiscretionary duty to deliver a SIGMET warning to pilots "once the meteorologists determine that severe CAT is occurring or is likely to occur." Pet. 8 (quoting Pet. App. 5a). But that nondiscretionary duty was never triggered here, because NWS meteorologists never made the predicate determination that severe CAT was occurring. As the district court explained, "[b]ecause the Government never decided that significant CAT was occurring, the NWS Instruction never required a response." Pet. App. 12a. Thus, under the facts of this case, the AWC's duty to issue a SIGMET warning to pilots had no application.

Any suggestion by petitioners that the NWS had "knowledge that severe CAT was occurring or expected to occur" (Pet. 13), and that AWC was therefore required to issue a SIGMET warning to the pilots, is without foundation. They cite no evidence that the NWS had any such knowledge or made any such determination, and the district court explicitly rejected that theory. See Pet. App. 12a ("the Government never decided that significant CAT was occurring"); see also *id.* at 11a

("[D]etermining whether moderate to severe CAT 'is occurring' requires discretion.").

b. It is likewise well-established that weather forecasting implicates the type of policy judgment that the discretionary function exception shields from liability. See *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As the court of appeals correctly determined, "[a] weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources." Pet. App. 6a (quoting *Brown*, 790 F.2d at 204). Forecasting involves a number of policy-based considerations, including "(1) cost and budgetary policy considerations in the NWS' forecasting and warning services; (2) the general 'don't overwarn' policy in which the NWS strives for 'the highest rate of severe weather detection while maintaining the lowest possible false alarm rate in the issuance of warnings,' and (3) the policy of vesting discretion in the forecaster." *Monzon*, 263 F.3d at 572 (quoting *Bergquist* v. *United States Nat'l Weather Serv.*, 849 F. Supp. 1221, 1228-1229 (N.D. Ill. 1994)).

Thus, because the only relevant NWS conduct challenged here (the fact that the NWS did not find that CAT was occurring or was expected to occur) was both discretionary and policy-based, the court of appeals properly affirmed the dismissal of petitioners' FTCA claims under the discretionary function exception.

2. The decision below does not conflict with any decisions of this Court or of any courts of appeal.

Petitioners argue (Pet. 9-11) that the decision below is inconsistent with *Berkovitz*, 486 U.S. at 536, and *In re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir. 1995), because the court of appeals failed to analyze separately whether

the NWS's failure to *forecast* turbulence, as well as the AWC's failure to *warn* of turbulence, each constituted discretionary functions. See *Berkovitz*, 486 U.S. at 536 (courts should analyze whether the agency conduct at issue involves "a matter of choice for the acting employee"); *Glacier Bay*, 71 F.3d at 1451 ("Each separate action must be examined to determine whether the specific actor had discretion of a type Congress intended to shield."). But contrary to petitioners' assertions, the courts below did analyze separately whether petitioners' allegations based on the asserted failure to forecast and on the asserted failure to warn each involved discretionary conduct.

As to the asserted failure to forecast or identify turbulence, the court of appeals held that the NWS's "underlying determination of whether severe CAT is occurring is discretionary." Pet. App. 5a; see *id.* at 27a-28a. It held that forecasting "involve[s] an element of judgment or choice" and is "the type of policy decision[] that the discretionary function exception protects from liability under the FTCA." *Id.* at 5a (citation omitted).

As to the asserted failure to warn of turbulence by issuing a SIGMET warning, the court of appeals specifically considered and rejected the applicability of the NWS Instruction requiring the issuance of SIGMET warnings. Pet. App. 5a. The court recognized that the directive to the AWC to issue a SIGMET warning applies only if the NWS, in its discretion, forecasts severe turbulence or determines that it is occurring. *Ibid.* Because this predicate discretionary determination was not

made here, no mandatory duty was implicated.* See *ibid.*; see also *id.* at 11a-12a, 27a-28a (district court orders finding that a mandatory duty to issue a SIGMET warning did not arise because the NWS did not determine, in its discretion, that turbulence was occurring or expected to occur). The court of appeals therefore had no reason to analyze separately whether the AWC's function of issuing warnings was discretionary in nature. See *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) ("[O]pinions are to be read in light of the facts of the case under discussion."). Nothing about this commonsense reasoning is inconsistent with *Berkovitz* or *Glacier Bay*.

3. Finally, there is no merit to petitioners' contention that the court of appeals' decision "expands the reach of the discretionary function exception." Pet. 12. Contrary to petitioners' assertion, the decision does not hold or suggest that every mandatory government activity becomes discretionary "if the government points to the exercise of discretion by some government employee somewhere in a chain of activities that leads up to a particular event." *Ibid.* Rather, the decision simply reflects the court's plainly correct understanding that a plaintiff cannot circumvent the discretionary function exception by invoking a mandatory government directive, unless that directive is applicable to the specific factual context presented.

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* Petitioners themselves recognize this point when they observe that "if no severe CAT is identified by government forecasters, then no SIGMET warning is issued." Pet. 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys

OCTOBER 2009